IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-6769

CHARLES HUGH BROWN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Respondent accepts the statements under this subheading in petitioner's petition for writ of certiorari on pp. 1, 2 thereof as being correct.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, §1257(3), or any other provision thereof at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

Respondent rejects the questions presented as framed by petitioner because same contain conclusions of the pleader and assumes affirmative or negative answers to questions that this Court must decide. Accordingly, respondent restates the questions presented as follows:

QUESTION ONE

WHETHER PETITIONER'S ARREST WAS SUPPORTED BY ADEQUATE PROBABLE CAUSE.

QUESTION TWO

WHETHER THE AFFIDAVIT FOR SEARCH WARRANT WAS INSUFFICIENT AS A MATTER OF LAW.

PRELIMINARY STATEMENT

Respondent is submitting under separate cover a copy of the complete record (four volumes) that was filed in the District Court of Appeal, First District, Florida. References to this record will be made by the symbol "R" followed by appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

In the trial court, petitioner entered a plea of nolo contendere reserving his right to appeal the denial of a motion to suppress (R Vol.I, p. 24)[1]. He was sentenced to five years on Count 1 and five years on Count 2 with said sentences being made to run consecutively (R Vol.I, pp. 26, 27). On appeal to the Florida First District Court of Appeal, petitioner's conviction was affirmed per curiam by opinion filed June 15, 1977. Petition for rehearing was denied July 25, 1977 following which petitioner filed his petition for writ of certiorari in the Florida Supreme Court

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1. All references except when otherwise designated are to the record on appeal as filed in the District Court of Appeal, First District, Florida.

on August 4, 1977 which was denied by order of that court dated December 8, 1977.

Officer D. E. Taylor working undercover met Anthony J. Cataldo at approximately 10:30 p.m. on May 24, 1975. Cataldo advised that he had a large quantity of marijuana and Taylor said he was interested in purchasing twenty pounds (R Vol.II, p. 11). This was a situation where Cataldo could not take Taylor directly to the source but agreed to take him to a location near the source. Taylor gave him $820 front money with which to buy twenty pounds of marijuana (R Vol.II, p. 12). After agreeing to the terms, Cataldo directed Taylor to a location near the intersection of Valdura and 103rd Street. It was then that Taylor gave him the money. Cataldo advised that he would return in a few minutes with the marijuana (R Vol.II, p. 13). Taylor had an idea as to where Cataldo would obtain the marijuana and had a surveillance team, Officers Howell and Higginbotham, set up on the premises located at 6209 Shindler Drive which Taylor believed to be occupied by Chuck Brown. Taylor was in radio contact with the surveillance unit (R Vol.II, p. 14). Taylor had reason to believe that Mr. Brown was involved in heavy drug traffic (R Vol.II, p. 15).

When Cataldo departed from the rendezvous at Valdura and 103rd Street to make the purchase of marijuana, he advised that when he returned in a few minutes, Taylor was to follow him down Valdura Street and that he (Cataldo) would pull off the road and turn the marijuana over to Taylor (R Vol.II, p. 17). The $820 front money that Taylor gave to Cataldo was marked in the sense that Taylor had the

serial numbers for the bills. When Cataldo departed, Taylor advised the surveillance unit and requested them to make contact if and when Cataldo arrived at 6209 Shindler Drive. Cataldo was driving a green Chevrolet Monza (R Vol.II, p. 18). In approximately a minute and a half to two minutes, the surveillance unit notified Taylor that Cataldo had pulled into the driveway of the premises located at 6209 Shindler Drive. Approximately ten minutes later, Taylor was notified by Officer Howell that Cataldo was backing out of the driveway and approximately one half to two minutes later he arrived at the rendezvous point, and Taylor followed him down Valdura Road at which time Cataldo turned over to him six pounds of marijuana (R Vol.II, pp. 19, 20). At this point, Taylor placed Cataldo under arrest and advised him of his rights (R Vol.II, p. 20). After advising Cataldo of his rights, Taylor questioned him, and Cataldo advised that he had been to the house on Shindler Drive and got the marijuana from a man named Chuck Brown. Cataldo also told Taylor that Brown had told him that he had already sold 400 pounds of marijuana that day (R Vol.II, pp. 21, 23). In addition to the six pounds of marijuana that Cataldo had in his possession for the purpose of turning over to Taylor, he also had two twenty dollar bills of the marked money that Taylor had given with which to purchase the twenty pounds of marijuana (R Vol.II, p. 23). Cataldo advised that he was paying $130 a pound for the marijuana and selling it for $160 a pound. Cataldo advised that he couldn't see any additional marijuana at Brown's house, but that Brown had advised him he had at least twenty pounds because that was the amount that Taylor initially planned to buy (R Vol.II, p. 24).

As to the exact location on the premises where the marijuana came from Cataldo said that it came from the garage (R Vol.II, p. 25). After placing Cataldo under arrest and searching him, Taylor next advised the surveillance unit that the buy had been consummated and Cataldo placed under arrest. Subsequently, Taylor telephoned an assistant state attorney and advised as to what had transpired and sought advice as to what should be done next. The assistant state attorney told Taylor that he believed there was sufficient probable cause to get a search warrant (R Vol.II, p. 27). Following the phone call, Taylor and other officers went to the premises at 6209 Shindler Drive. Taylor was in the first car that arrived at the premises and as he got out of the car, a man came out of the back door, a man Taylor subsequently discovered to be Chuck Brown. Taylor was standing right at the back door of the house and advised him of his identity and that he was under arrest. At the same time, Taylor could smell burning marijuana from inside the residence. Another officer behind Taylor came up and detained Brown while Taylor went into the residence and walked into a little dining room area which projects into the kitchen. At this point, Taylor saw four or five people sitting around the table, one of which was smoking a marijuana cigarette. He advised all of the individuals that they were under arrest and then checked the rest of the house to determine whether anybody else was inside. All of the individuals were taken into the dining area and searched. As a result, the marked bills initially given to Cataldo were recovered from Chuck Brown's pocket. All of the individuals with the exception of Brown were transported to jail. Officers Howell and Higginbotham remained with Brown until Taylor could return with a search warrant for the purpose of searching the premises. None of the officers present on the scene conducted any form of a search

of the house or the garage at that point (R Vol.II, pp. 28-30).

On cross-examination, at the suppression hearing, Taylor testified that Brown told him that he lived there and was the only person that lived there (R Vol.II, pp. 39, 40). A search warrant was obtained issued by Judge Richardson and pursuant thereto the premises were searched and the officers recovered 180 pounds of marijuana, a number of marijuana plants, marijuana pipes and things of this nature (R Vol.II, pp. 36, 37). The search warrant was issued for the premises and the curtilage thereof described in the search warrant. The search warrant and affidavit, together with the inventory and receipt is found at R Vol.I, pp. 1-5.

Officer Howell was located across the street from the premises about 125 feet with a clear view (R Vol.II, p. 124). Between 12:00 midnight and 12:10 a.m., the officer observed a dark green Monza enter the yard and drive up to the house. A driver exited the automobile and walked around to an area in the back of the house. A few minutes later, he reappeared with another individual and walked down beside the garage where Howell lost sight of them for three or four minutes. Then two individuals reappeared and walked up to the automobile. The taller of the two placed a bundle or package in the front from the driver's side of the Monza. In other words, the taller person was not the person who drove up in the car. When the Monza left the premises, Officer Howell immediately radioed Officer Taylor and advised that the Monza was headed back in his direction (R Vol.II, pp. 125, 127).

ARGUMENT

QUESTION ONE

WHETHER PETITIONER'S ARREST WAS SUPPORTED BY ADEQUATE PROBABLE CAUSE.

If the facts set forth in this brief are insufficient to provide adequate probable cause to support a felony arrest, then the police officers of this state might just as well fold up their tents and silently steal away. In United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1971), the Fifth Circuit sustained an arrest on probable cause even though the officers had an opportunity to secure a warrant before the arrest. Sub judice, there was no such opportunity. Respondent relies on Johnson v. United States, 328 F.2d 883 (5th Cir. 1964), cert. denied 13 L.Ed.2d 1953; Casso v. State, 182 So.2d 252 (Fla.App. 2 1966); Salas v. State, 246 So. 2d 621 (Fla.App. 3 1971); Crawford v. State, 334 So.2d 141 (Fla.App. 3 1976). It should be firmly kept in mind that the statements made by Cataldo to Taylor were against his own penal interest. See State v. Patterson, 309 So. 2d 555 (Fla.App. 2 1975); and United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971).

Petitioner did not indulge in the futile effort of challenging in the court below the search of his person and the search of other persons found on the premises when such searches were incident to the arrests made. At this late date, no one should question the right of an officer to search a person after a valid arrest. United States v. Rabinowitz, 339 U.S. 56 (1950); and Gustafson v. Florida, 414 U.S. 260 (1973).

QUESTION TWO

WHETHER THE AFFIDAVIT FOR SEARCH WARRANT WAS INSUFFICIENT AS A MATTER OF LAW.

The above question is answered in the negative. The issue in search warrant proceedings is not guilt beyond a reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises. United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971). As was said in Harrington v. State, 110 So. 2d 495 (Fla.App. 1 1959):

> "The test is not whether the affiant should or should not rely on the information provided by the informer, but simply whether he did rely upon it and whether the circumstances stated by the affidavit are reasonably sufficient to warrant the conclusion that it is likely the law is being violated."

See also Treverrow v. State, 194 So.2d 250 (Fla. 1967).

Indeed, in Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584, this Court said that "only the probability and not a prima facie showing of criminal activity is the standard of probable cause for the issuance of a search warrant."

A Florida court in Paula v. State, 188 So.2d 388 (Fla.App. 2 1966), followed these lines and held that "probable cause for search and seizure with or without a search warrant involves probabilities which are not technical but factual and practical considerations of every day life upon which reasonable and prudent men act, and the essence of probable cause is a reasonable ground for the belief of guilt."

In Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964), this Court considered the matter of hearsay in affidavits and held:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the natcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information reliable."

Jones v. United States, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725, went on to state that "hearsay evidence may provide the probable cause necessary for the issuance of a search warrant where a substantial basis for crediting the hearsay evidence is presented." And concerning an affiant's personal observation, "an affidavit is not to be deemed insufficient because of observations of those other than affiant."

Although Florida courts have adopted this standard, the Supreme Court of Florida has stated that an affidavit for a search warrant which is otherwise sufficient is not tainted by reference to a confidential tip, even though the tip be inadequate itself. State v. Smith, 233 So.2d 396 (Fla. 1970). The Second District Court of Appeal also added in State v. Lewis, 225 So.2d 170 (Fla.App. 1969), that an affidavit need not allege that the informant is a reliable source.

In the more recent case of Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971), although it was reversed in favor of Whiteley, an important point was brought out. Arresting officers often act on the assumption

that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime. To prevent the officers from assuming this would unduly hamper law enforcement.

In the landmark decision of United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971), probable cause to search a suspected moonshiner's premises was established by an affidavit based largely on hearsay obtained from a prudent person who had recent personal knowledge of a suspect's illegal whiskey sales and admitted participation in the illegal activity.

However, in United States ex rel DiRienzo v. Yeager, 443 F.2d 228 (3rd Cir. 1971), the informer is found to be reliable because his admission was against his own penal interest, the informant admitting he and defendant were partners in crime and describing the items that were stolen and that such items were hidden in the defendant's apartment. This Court in United States v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741, added:

> "Where an affidavit for a search warrant detains the underlying circumstances upon which is based a belief that probable cause exists, reason for crediting the source of the information is given, and a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner and should resolve doubtful or marginal cases according to the preference to be accorded to warrants."

The procedure for finding probable cause and issuing search warrants is supported by the expression of the Supreme Court of New Jersey (State v. Burnett, 42 N.J. 377, 201 A.2d 39), which this Court adopted in

McCray v. Illinois, 386 U.S. 300, 18 L.Ed.2d 62, 87 S.Ct. 1056, at 1060:

> "The 4th Amendment is served if a judicial mind passes upon the existence of probable cause. When the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced."

Respondent contends that the facts stated in the affidavit for search warrant were more than adequate to furnish the requisite probable cause for the issuance of the warrant.

Respondent urges the court to read the affidavit in a "commonsense" manner as suggested by United States v. Ventresca, supra. Petitioner seems to be arguing that there were false statements in the affidavit. The rule seems to be that only deliberate inclusion of a false statement or a reckless inclusion of a false material statement should be fatal to an affidavit for search warrant. United States v. Luna, 525 F.2d 4 (6th Cir. 1975). See also United States v. Thomas, 489 F.2d 664 (5th Cir. 1973); United States v. Marihart, 492 F.2d 897 (8th Cir. 1974), cert. denied 42 L.Ed.2d 51; United States v. Pond, 523 F.2d 210 (2nd Cir. 1975), cert. denied 96 S.Ct. 794. We close on this issue of probable cause by quoting from the argument of Assistant State Attorney Dubray:

> "Here the officer had in his knowledge and information, firsthand information, six pounds of cannabis which he paid marked money for; that a felony had, in fact, been committed from the premises which he already had suspicion to believe were going to be used for

that specific purpose. The testimony is uncontested this was, in fact, the premises of that person who had been dealing; it was under surveillance at that point for the purpose of setting up and possibly making a buy out of those premises, a person who was dealing in drugs. That surveillance corroborated what Officer Taylor said, that Cataldo had gone to that residence, obtained a quantity of substance from there and paid for it with marked money. The officer did as any reasonable officer with his experience would do, go to the premises and attempt to secure the premises and obtain a search warrant therefor. I think it's significant in the officer's testimony and to his credit and to his experience that when he entered the premises he did not even search that tin box that was on the table in front of all the individuals. Knowing that a search warrant could be obtained for the premises, his desire at that time being to secure the premises and the people located thereon."

(R Vol.II, p. 144)

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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